United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-2036

United States Court of Appeals
For the Second Circuit

ROBERT RICKENBACKER,

Appellant,

v.

THE WARDEN, AUBURN CORRECTIONAL FACILITY AND THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

On Appeal From The United States District Court For The Eastern District of New York

APPELLANT'S BRIEF

B/P/S

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ROBERT RICKENBACKER,

Appellant,

-against-

THE WARDEN, AUBURN CORRECTIONAL FACILITY, AND THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

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BRIEF ON BEHALF OF APPELLANT ROBERT RICKENBACKER

STATEMENT OF CASE; JURISDICTION

Robert Rickenbacker, appellant, was tried by the State of New York for the crime of felony murder. He was convicted after a jury trial, and sentenced to a term of twenty-five years to life. The conviction was affirmed without opinion by the Appellate Division, People v. Rickenbacker, 46 A. D. 2d 740 (2nd Dept. 1974), and leave to appeal was denied by the Court of Appeals.

A petition for a writ of habeas corpus was denied by the District Court for the Eastern District of New York, Platt, J., on February 24, 1976, No. 75 C 634. A Certificate of Probable Cause was granted on April 6, 1976.

STATEMENT OF FACTS

On July 30, 1975, three men entered a grocery store at Nostrand and Albemarle Avenues in Brooklyn. The owner, Sam Fichera, was serving customers. In the store were Fichera's cousin, Vito Petrancosta, and Petrancosta's son Michael. One of the three robbers , Zachary Morgan, was armed. The three attempted to rob the store. In the course of the robbery, Morgan shot and killed Vito Petrancosta. The three then ran out of the store towards a waiting car. Fichera, who was licensed to possess a weapon, pursued them, firing two shots.

Patrolmen Thomas Walsh and Donald Scannapieco were on radio motor patrol in the area at that time. Hearing Fichera's shots, they ran in that direction. They saw three men running towards a parked car. One of them, Zachary Morgan, entered the car and was apprehended by Scannapieco with the driver, one Curtis Austin. The other two fled on foot and were pursued by Patrolman Walsh in his police car. Walsh testified that one of the two men, whom he identified as Rickenbacker, tossed a gun between two parked cars as he was running. When the two fleeing men ran in different directions Walsh pursued and caught David Ferguson. The third man escaped.

At the police station, Morgan, Ferguson and Austin, or one of them, apparently stated that Robert Rickenbacker was the third man

who had escaped.[1] Detective Robert Marshall, who had been assigned the case, testified that after speaking to Morgan, Ferguson and Austin at the police station, he went looking for Rickenbacker at 63 Decatur Street in Brooklyn where he spoke to one Thomas Rickenbacker,[2] and made a room-to-room search of the house. He subsequently went to several other addresses in Brooklyn and Queens searching for Rickenbacker, but was unable to find him.

Rickenbacker was not located until March 11, 1971, nine months after the robbery, when he was apprehended on unrelated charges, charges that are not specified in the record. His first trial, at which Morgan and Ferguson were co-defendants, ended in a hung jury only as to Rickenbacker.

At his second trial, both Fichera and Michael Petrancosta testified that only one of the robbers, positively identified as Zachary Morgan, had a gun. Both Fichera and Petrancosta positively identified Morgan and

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1. None of these three was called as a witness. All three had been convicted prior to the instant trial.

2. The trial judge struck the name of the person allegedly spoken to, Thomas Rickenbacker, from the record, and instructed the jury to disregard it. Shortly thereafter, Marshall testified that at another address he spoke to one James Rickenbacker. That name was also ordered stricken, and the jury again instructed to disregard it (T 78-79, 82-84). It is well-known that jurors, like all human beings, cannot totally "strike" words from their memories merely because they are instructed to do so. Neither Thomas Rickenbacker nor James Rickenbacker was called as a witness.

David Ferguson as participants in the robbery. Neither could identify Rickenbacker. The two patrolmen, Scannapieco and Walsh, positively identified Rickenbacker. Scannapieco's identification was based on two glimpses, Walsh's on possibly five during the chase. Scannapieco and Walsh both testified that two of the three men they saw running towards the parked car had guns, although both Fichera and Petrancosta insisted that only Morgan was armed.

At the trial Rickenbacker was represented by assigned counsel.[3] In cross-examining the state's seven witnesses, counsel asked a total of twenty-six questions.[4] The defense rested without presenting any case.[5]

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3. Counsel had apparently been initially retained by Rickenbacker's family. However, during the time of trial he was appearing as assigned counsel.

4. Counsel asked seven questions of Mr. Fichera. The State objected to two of these, and the objections were sustained. All seven questions related to Mr. Fichera's own gun, and to tests performed by the police on that gun.

   Eight questions were asked of Patrolman Walsh. At least three were repetitious of the district attorney's questions (i.e., Q. "Did I understand you to say . . . ?" A. "Yes.")

   Counsel asked seven questions of Patrolman Scannapieco, five of which were repetitious of direct testimony.

   Marshall was asked four questions, three of which were a repetition of direct.

   No questions at all were asked of Michael Petrancosta, Patrolman Thomas Moore (who had gone to the store after the robbery, and accompanied the victim to King's County Hospital, but was not involved in the chase) or Dr. Milton Wald (the Medical Examiner).

5. The record indicates, at T. 145, that out of the presence of (Cont'd.)

ISSUE

Should the Second Circuit broaden the standard to be applied in determining whether an accused has received effective assistance of counsel?

1. HISTORY AND BACKGROUND

The Sixth Amendment provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." That right is guaranteed in state criminal trials by the Fourteenth Amendment Due Process clause. Gideon v. Wainwright, 372 U.S. 335 (1963), Argersinger v. Hamlin, 407 U.S. 25 (1972). The Constitution is not satisfied by the pro forma appearance of counsel, Powell v. Alabama, 287 U.S. 45 (1932). Rather it mandates that an accused receive effective assistance of counsel. Avery v. Alabama, 308 U.S. 444 (1940).

What is effective assistance of counsel? Against what standard is an appellate court to measure the performance of counsel at the trial level? The Supreme Court has not yet spoken on the question.[6] The

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5. (Cont'd.) the jury Rickenbacker told his attorney that he wanted certain witnesses called. This occurred after the prosecution had told the court, but not the jury, that its case in chief was complete. The record does not reveal who these witnesses were, or what their testimony might have concerned.

6. In a related context the Court has held that pre-trial advice to an accused must be "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. (Cont'd.)

circuits are in conflict.

The earliest case to establish a standard for measuring the effectiveness of counsel is Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), cert. den. 325 U.S. 889 (1945). The Diggs court held that trial counsel would be considered effective unless his performance were so inadequate as to turn the proceedings into a sham, a farce, a mockery of justice. Five Supreme Court cases were cited for this proposition (148 F.2d at 669, fn. 2). None of them supports it. Rather, each stands for the proposition that where the proceedings have been turned into a farce, for whatever reason, no conviction can stand.[7] None suggests the proceedings must be reduced to that level before relief will be granted.

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6. (Cont'd.) 759, 771 (1970). The Court noted that counsel could not and should not be expected to predict accurately future court decisions, but advised the courts "that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." Id. In the companion case of Parker v. North Carolina, 397 U.S. 790 (1970), the Court held that the advice rendered by counsel was also within the required range. It has not further defined the lower limits of "competence".

7. The five cases cited are Moore v. Dempsey, 261 U.S. 86 (1923) (mob violence), Powell v. Alabama, supra, (mob violence; no counsel appointed), Mooney v. Holohan, 294 U.S. 103 (1935) (knowing use of perjured testimony by prosecutor; writ not issued for failure to exhaust state remedies), Brown v. Mississippi, 297 U.S. 278 (1936) (coerced confession), and Johnson v. Zerbst, 304 U.S. 458 (1938) (no counsel at trial).

The Diggs Court then offered what is best described as a pragmatic rationale for its holding.It noted that " (i)n many cases there is no written transcript and so (a habeas petitioner or 'jailhouse lawyer' attacking a conviction) has a clear field for the exercise of his imagination." Id. at 670. It surmised that convicts would, out of sheer boredom or monotony, submit groundless petitions for federal habeas relief based upon incompetency, thus inundating the federal courts. Today, of course, virtually all criminal proceedings are transcribed so that the pragmatic justification no longer exists.

The District of Columbia Circuit reaffirmed the "farce,sham,mockery" standard in Jones v Huff, 152 F2d 14 (D.C. Cir.1945)and subsequent cases.When the question arose in other circuits they, in the absence of other precedent, adopted the Diggs test without analyzing the underlying rationale. Thus a form of precedential inbreeding was instituted, with each circuit (except the Fourth Circuit) rotely asserting the "farce,sham,mockery"standard, merely citing Diggs and/or cases which ultimately rely on Diggs.

Over the years, though, most of the circuits have come to realize that the Diggs standard is on its face too low, that an attorney's performance may well be ineffective without falling to the level of a "farce", that the constitutional guarantee of effective assistance assures an accused something more than a travesty, that the line must be drawn somewhere above the level of the absurd.

We demonstrate in the argument that courts have used different words to describe what constitutes "effective" assistance of counsel. Some have broadened the definition of "farce", while continuing to pay lip service to the Diggs test. Others speak of broadening the definition of "effective". Some have attempted to devise "check lists" of various things an attorney must do in order to be effective within the meaning of the Sixth Amendment. Others have said the attorney's performance must meet a "minimum level", or a "customary level", or the "prevailing level" of competency.[8] Whatever words are chosen, the fact remains that the courts are demanding a highe level of performance than that imposed by Diggs and its progeny.

Only three circuits continue to apply the "farce, sham, mockery" standard without modification. Each initially adopted it without analysis,

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8. The term "minimum level" would appear to be ill-chosen. An analysis of the cases using the phrase indicates that those courts actually demand a performance which meets a prevailing or customary level of competency.

merely stating it and citing cases. None has ever attempted to vindicate or support it independently. The reason is obvious. The application of the uncompromising "farce, sham, mockery" test can no longer be justified. Every circuit which has subjected that standard to examination has modified it.

II. COURTS WHICH HAVE ABANDONED THE "FARCE, SHAM, MOCKERY" TEST

A. The District of Columbia Circuit.

The circuit which gave birth to the "farce, sham, mockery" standard abandoned it sub silentio in Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967), where it held:

> " In earlier cases it was said that a claim based on counsel's incompetence cannot prevail unless the trial has been rendered a mockery and a farce. These words are not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing requisite unfairness. " Id. at 116.

The circuit has since reaffirmed Bruce, in Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970), where it remarked:

> " The 'farce and mockery' standard derives from some older doctrine of the content of the due process clause of the Fifth Amendment. What is involved here is the Sixth Amendment. The Sixth Amendment

> has overlapping but more stringent standards than the Fifth Amendment as is clear from other contexts. Compare, for example, United States v. Wade, 388 U.S. 218 (1967) with Stovall v. Denno, 388 U.S. 293 (1967). The appropriate standard for ineffective counsel, set forth in Bruce, supra, is whether gross incompetence blotted out the essence of a substantial defense." Id. at 610.

In United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), the court held:

> " A defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate."
> Id. at 1202 (Emphasis in original)

B. The Third Circuit.

The Third Circuit adopted the Diggs test in United Statex ex rel. Darcy v. Handy, 203 F.2d 407, 417 (3rd Cir. 1953) (en banc), citing cases which rely, ultimately, on Diggs. That standard was abandoned in 1970 when the court held, again en banc:

> " The standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place."
> Moore v. United States, 432 F.2d 730, 736 (3rd Cir. 1970) (en banc) (footnote omitted)

The court noted the differing terms used by various circuits to describe the standard against which counsel's performance is to be measured, and

relied on McMann v. Richardson, supra, to support its own formulation. The circuit has since reaffirmed Moore in United States v. Hines, 470 F.2d 225 (3rd. Cir.), cert. den. 410 U.S. 968 (1972), and Johnson v. Johnson, 18 Cr. L. Rep. 2559 (3rd Cir. 1976) (applying Moore to cases arising in the state courts).

C. The Fourth Circuit.

The Fourth Circuit is the only one to have adopted the "farce, sham, mockery" standard without explicitly relying on Diggs or its progeny. In Snead v. Smyth, 273 F.2d 838 (4th Cir. 1959), it presented the test as if it were a basic proposition for which no authority need be cited. And indeed the Snead court cited no authority whatsoever.

The Fourth Circuit continues to pay lip service to the standard. However, beginning with Coles v. Payton, 389 F.2d 224 (4th Cir. 1968), it has been compiling a kind of "check list" of professional obligations which counsel must fulfill to provide constitutionally effective representation. A defense attorney must, for example, confer with his client, explain the elements of the charge to his client, ascertain possible defenses, conduct appropriate investigations (factual and legal), and allow himself time to reflect and prepare. 389 F.2d at 226. Fulfillment of these obligations would obviously lift the quality of representation well into the "prevailing level" category.

D. The Fifth Circuit.

In 1960, when first faced with the question of what standard to apply, the Fifth Circuit held that the Sixth Amendment required:

> "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960)

In subsequent cases the court appeared to retreat from MacKenna, adopting the "farce, sham, mockery" terminology and citing cases which rely (with the exception of one Fourth Circuit case) on Diggs. Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965).

But in 1973 the court stated specifically that in MacKenna it had rejected the Diggs test, and that MacKenna is controlling. West v. Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973). It is clear from the discussion in West that the MacKenna standard contemplates a performance analogous to the Third Circuit's "prevailing level" standard.

E. The Sixth Circuit.

The Sixth Circuit initially adopted the Diggs test in O'Malley v. United States, 285 F.2d 733 (6th Cir. 1961). In doing so, it too relied on Diggs and its progeny. Id. at 734. It rejected the standard in Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), with an exhaustive analysis of the Supreme Court cases related to the Sixth Amendment right

to effective counsel and an authoritative discussion of Diggs, Bruce, and West, supra. The Beasley court's examination of McMann v. Richardson indicates that the Sixth Circuit also contemplates a prevailing level standard. 491 F.2d at 771.

F. The Seventh Circuit.

The Seventh Circuit was one of the earliest to adopt the "farce, sham, mockery" test, relying specifically on Diggs. United States ex rel. Feeley v. Ragan, 166 F.2d 976, 981 (7th Cir. 1948). Last year it "broadened" that standard, stating:

> " The criminal defendant, whether represented by his chosen counsel, or a public agency, or a court-appointed lawyer, has the constitutional right to an advocate whose performance meets a minimum professional standard . . . We now hold that the Constitution guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640-41 (7th Cir. 1975)

G. The Eighth Circuit

The Eighth Circuit apparently had no occasion to rule on the question of what standard to apply until 1967. It then adopted the "farce, sham, mockery" test, without analysis. It merely cited cases from the Sixth, Tenth, and District of Columbia Circuits, all of which rely on Diggs directly or indirectly. Cardarella v. United States, 375 F.2d

222, 230 (8th Cir. 1967).[9]

The court has recently abandoned the Diggs standard. Garton v. Swenson, 497 F.2d 1137 (8th Cir. 1974) and McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974), followed the MacKenna and Bruce line of cases. In Johnson v. United States, 506 F.2d 640 (8th Cir.), cert. den. 95 S. Ct. 1404 (1974), a "prevailing level" standard was specified.

H. The Military Courts.

The military courts have abandoned the "farce, sham, mockery" test. Indeed, they were among the first to do so. The Court of Military Appeals had adopted it in United States v. Hunter, 2 USCMA 601, 26 CMR 381 (1958), the court cited Hunter for the farce standard, but immediately went on to say:

> " By that broad language we did not intend to be understood as saying that the highest degree of professional competency is not to be expected of an appointed defense counsel. "
> 9 USCMA at 604.

The Horne court reversed the conviction because of counsel's inactivity at trial and his failure to present an entrapment defense.

In United States v. Blunk, 17 USCMA 158, 37 CMR 422 (1967), it was noted that "[t]his Court has consistently demanded 'the highest

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9. Cardarella opinion was released one month prior to Bruce.

degree of professional competency . . . of an appointed defense counsel' [citing Horne]", and went on to indicate that the same standard applied to retained counsel. 17 USCMA at 160. In reversing a conviction for incompetency of counsel in United States v. Evans, 18 USCMA 3, 39 CMR 3 (1968), the court caustically remarked, "defense counsel did not fully understand that he is not amicus for the court-martial, but an advocate for the accused", 18 USCMA at 4, citing Blunk and Horne.

III. A CIRCUIT IN TRANSITION

The First Circuit, like the Eighth, was late in adopting the Diggs standard. Bottiglia v. United States, 431 F.2d 930 (1st Cir. 1970). It did so without making its own, independent analysis of the standard, merely relying on cases from the District of Columbia, Second, Ninth and Tenth Circuits. Bruce, Scott, and MacKenna are not mentioned, although Bottiglia relies on an older District of Columbia case which had, in effect, been superseded by Bruce and Scott. 431 F.2d at 931.

However, in two recent cases the court has strongly implied that it is merely waiting for the appropriate opportunity to substitute a standard such as the Fifth Circuit's MacKenna-West formula. In Moran v. Hogan, 494 F.2d 1220 (1st Cir. 1974), the court stated: "The instant case is an inappropriate one for reassessment of this Circuit's standard because the alleged defect . . . was too insubstantial under either

standard." 494 F.2d at 1222, fn. 4. And in Dunker v. Vinzant, 505 F.2d 503 (1st Cir. 1974), the court noted that trial counsel's performance had passed any test. At least one District Court has read Dunker and Moran as requiring it to test an attorney's performance by a "reasonably diligent and conscientious" standard as well as by the Diggs criteria. Karger v. United States, 388 F.Supp. 595 (D. Mass. 1975).

IV. CIRCUITS WHICH CONTINUE TO APPLY THE "FARCE, SHAM, MOCKERY" TEST

A. The Second Circuit

This Court was one of the first to adopt the Diggs standard. United States v. Wight, 179 F.2d 376 (2nd Cir. 1949), cert. den. 338 U.S. 950 (1950), gave no reasons of its own for adopting the test. It merely relied on Diggs, its progeny in the District of Columbia Circuit, and Feeley in the Seventh Circuit. Numerous cases in this circuit have continued to apply that standard, e.g., United States v. Currier, 405 F.2d 1039 (2nd Cir.), cert. den. 395 U.S. 914 (1969) (relying on Wight), United States v. Sanchez, 483 F.2d 1052 (2nd Cir. 1973) (relying on Currier quoting Wight), United States ex rel Walker v. Henderson, 492 F.2d 1311 (2nd Cir. 1974) (relying on Wight and its progeny).

Most recently, in United States v. Yanishefsky, 500 F.2d 1327

(2nd Cir. 1974), this Circuit reiterated its formulation of the Diggs test, i.e., whether the representation was so woefully inadequate as to shock the conscience. It noted that it had been invited to adopt the Sixth Circuit's "minimum level" approach, but declined to do so. 500 F.2d at 1333, fn. 2. The Yanishefsky court did not explain why it declined the invitation. Nor did it offer any justification for retaining the Diggs standard. As far as can be determined by Yanishefsky, the only rationale for continued adherence to the standard is the dead weight of stare decisis.

B. The Ninth Circuit

The "farce, sham, mockery" standard was adopted by the Ninth Circuit in Latimer v. Cranor, 214 F.2d 926 (9th Cir. 1954). In doing so it relied specifically on Diggs and on Jones v. Huff, supra, another District of Columbia case which itself relies on Diggs. No rationale other than precedent was given. The Ninth Circuit has continued to reiterate that standard, relying solely on precedent. See, e.g., United States v. Stern, 519 F.2d 521 (9th Cir. 1975). It has never attempted to justify the test qua test. It has never re-examined the standard in light of Bruce, Scott, Beasley, et al.[10]

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10. In Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), the court cited MacKenna with approval. This appears to be an aberration, however.

C. The Tenth Circuit

In adopting the Diggs standard, Frand v. United States, 301 F.2d 102 (10th Cir. 1962), the Tenth Circuit relied on Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), cert. den. 358 U.S. 850 (1958) (which relies on Diggs), and on Black v. United States, 269 F.2d 38 (9th Cir. 1958)(which relies on Latimer, supra, which in turn relies on Diggs). As with the Second and Ninth Circuits, the Tenth Circuit has failed to reappraise the standard in light of Bruce, Scott, Moore, Beasley, et al. It, too, has been mesmerized by stare decisis.

V. COMMENTATORS

Commentators are universally opposed to the "farce, sham, mockery" test. One distinguished judicial critic has attacked the standard as "itself a mockery of the sixth amendment". Bazelon, Defective Assistance of Counsel, 42 U. of Cinn. L.R. 1, 28 (1973). See Bines, Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus, 59 Va. L.R. 927 (1973); Finer, Ineffective Assistance of Counsel, 58 Corn. L.R. 1077 (1973) (suggesting the proper standard is "whether counsel exhibited the normal and customary degree of skill possessed by attorneys who are fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar." Id. at 1080, emphasis in original); Waltz,

Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 N.W.U.L.R. 289 (1964); Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L.R. 1434 (1965). Counsel has been unable to find any critics upholding the "farce, sham, mockery" test on its merits.

VI. THE STATE COURTS IN THIS CIRCUIT

A. Connecticut

On March 2, 1976, the Connecticut Supreme Court abandoned the "farce, sham, mockery" test. State v. Clark, 18 Cr.L.Rep. 2558. In its place, the court adopted a standard similar to that proposed by Finer, supra, holding that the defense attorney's performance must be "within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." Id. at 2559.

B. New York

New York, like the Fourth Circuit, continues to pay lip service to the "farce, sham, mockery" standard. However, it too has begun to "spell out" the affirmative duties of counsel, and in fact relies on Coles v. Payton, supra, in doing so. People v. Bennett, 29 N.Y.2d 462, 466-67, 329 N.Y.S.2d 801, 804 (1972); People v. Labree, 34 N.Y.2d 257, 260-61, 357 N.Y.S.2d 412, 414-15 (1974).

C. Vermont

Vermont, while using the "farce, sham, mockery" terminology, declares its standard thus:

> " We have, therefore, while expressing the lesser standard of 'mockery of justice', at the same time carefully reviewed the complained-of conduct to test its conformity with the standards of reasonable competence, thus justifying our own comment that there is 'neither uniformity of discussion nor certainty' on the point in question. [In re Bousley, 130 Vt. 296] at 299, 292 A.2d [249] at 252 [(1972)].
> In re Cronin, __ Vt. __, 336 A.2d 164, 168 (1975)

The Vermont Supreme Court went on to cite MacKenna, supra, and the Third Circuit's "prevailing level" standard as expressing "the modern weight of authority, and the better view, " and noted that the United States Supreme Court appeared to have endorsed that standard in McMann, supra. [336 A.2d at 168]

The Vermont Court in Cronin also dealt with the oft-asserted argument that a particular attorney had in the past demonstrated skill in criminal defense:

> " As a matter of common knowledge, the most competent counsel may, from time to time, deviate seriously from standards of reasonable competence, and it is no complete answer to say to a respondent that his attorney has demonstrated great proficiency in other cases. His concern is his own

> case; his right is reasonable competence in this case." 336 A.2d at 168

Thus, all three states within this Circuit have moved beyond the unmodified "farce, sham, mockery" standard.

VII. THE SECOND CIRCUIT HAS A DUTY TO RE-EXAMINE THE DISCREDITED DIGGS LINE OF CASES, AND EITHER BROADEN ITS STANDARD OR OFFER A REASONED RATIONALE FOR MAINTAINING IT.

When this Circuit adopted the "farce, sham, mockery" standard, it relied on Diggs and its progeny in the District of Columbia Circuit, and on Feeley in the Seventh Circuit. Both Circuits have found it necessary to abandon that test. No court has been able to suggest any rationale other than mere precedent for retaining the strict standard. In this bicentennial year it is inconceivable that any court faced with the question as one of first impression could possibly adopt the unmodified Diggs test. It cannot withstand conscientious examination. Every court which has subjected the standard to analysis has come to the same conclusion. Bruce, Scott, Moore, Coles, West, Beasley, Williams v. Twomey, Garton, Moran, and Blunk, all supra.

Those courts have not reached that conclusion out of whim or caprice. They have reached it by carefully examining all the cases relating to the Sixth Amendment guarantee of effective assistance of counsel. They have determined that the Sixth Amendment mandates a

level of competence higher than that established by the unmodified "farce, sham, mockery" rule. They have recognized that although deference must be paid to established precedent, even precedent must fall when it is supported by nothing more than its own weight.

This Court has long had a reputation surpassing that of any appellate court in the land. Its judges have been cited approvingly by literally every court in the country, including the United States Supreme Court. Such a reputation has not been acquired by automatically applying stare decisis to every case. Rather it has been bestowed as a crown of laurel, in recognition of the fact that this court is a thinking court, a court which seriously considers both the bases and the ramifications of its decisions.

In recent years persons from all areas of the profession have expressed concern for the quality of legal representation manifested in our courts. The highest judicial officer of this country has stated that one may assume "as a working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Ford. L.R. 227, 234 (1973). The Second Circuit has been a leader in the movement to improve the quality of legal assistance. See Kaufman, Address at County Lawyers Dinner, N.Y.L.J., December 7, 1973, p. 1. It is utterly incongruous

for this court on the one hand to make every possible effort to improve the quality of legal representation, and on the other refuse to protect a criminal defendant unless the quality afforded him reduces his trial to the level of a farce, a sham, a mockery which shocks the conscience.[11] If this Court wishes to retain that discredited standard, it has an affirmative duty to explain its rationale, and to reconcile such a holding with its effort to improve the level of legal representation.

What constitutes due process changes over the years. The beauty of the common law is that it recognizes and adjusts to such evolving concepts, that it refuses to be bound by mere precedent for no better reason than that it is precedent. If it were not so, there would be no need for this or any other appellate court. This court cannot abdicate its duty -- which is its glory -- to reexamine stale holdings and create new ones which recognize the present human conditions.

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11. If this Circuit were to impose a "prevailing level of skill' standard, as in Moore, supra, it would undoubtedly have the collateral effect of improving the quality of representation in criminal cases. At the present time one must, unfortunately, suspect that some attorneys do not always give their best efforts precisely because they know they will not be criticized unless they fall below the farce, sham, mockery level.

The Standard of Representation in the Present Case

It would not be difficult for counsel on this appeal to allege that the standard of representation in this case fell below the "farce, sham, mockery" level, though trial counsel was present at all times. He did not sleep through the case in chief. He had heard of Miranda and Wade. As far as is known he made no egregious misrepresentations of law to his client.[12]

However, in examining a claim of incompetency of counsel one must look at the entire picture presented. Individual miscalculations, individual "strategic decisions", taken alone might well appear to be simple errors in judgment, of the sort that every human being makes every day. But when one examines a trial record such as this one, and finds miscalculations after miscalculation, strategic error after strategic error, one begins to wonder.

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12. As noted previously, Rickenbacker is presently insane, and confined at Mattewan. Present counsel is therefore unable to rely on statements made by him. Counsel has also felt that, because of Rickenbacker's present condition, it would be inappropriate to present Rickenbacker's assertions as to the circumstances and particulars surrounding the "defense" provided him by trial counsel to the court. For those reasons, counsel has chosen to assail the quality of the trial defense "on the record", although in normal circumstances such an attack would be based on matters not of record.

A. The Defense Made No Opening Statement to the Jury.

The prosecution opening was strong, setting forth clearly the facts as the prosecution perceived them, and the theory (felony murder) underlying the prosecution's case. In certain situations a defense attorney may well decide to reserve his opening, or to dispense with it entirely. For example, where the weaknesses in the prosecution's case will become obvious to the jury through intelligent cross-examination, or where the "defense theory" is vigorously presented through the defense's own witnesses and evidence, it may be appropriate to "keep the jury wondering". Here, where there was nothing which could be appropriately characterized as "cross-examination", and no defense presented, the failure to open constituted incompetency.

B. Cross-Examination Was Incompetent.

Cross-examination has been properly described as an art. Volumes have been written on the subject.[13] Although one could not reasonably insist that every attorney have the skill of a Darrow, surely some minimum level of competence is demanded.

Here, as noted above, trial counsel asked twenty-six questions in his "cross-examination" of four witnesses. A first-year law student would have known enough to ask Mr. Fichera, the storeowner and eye-

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13. E.g., Wellman, The Art of Cross-Examination (4th Ed.) 1936; Busch, Law and Tactics in Jury Trials, 1950; Goldstein, Trial Technique (1935).

witness to the robbery and murder, questions establishing clearly for the jury that he did not identify Rickenbacker as the "third man". Other obvious lines of questions would include: (a) asking Fichera to describe the third man, including his clothing; (b) emphasizing that only one of the robbers, Morgan, was armed; (c) determining whether either of the other two might have had a weapon concealed on his person; (d) emphasizing that Fichera saw only two men running down the street when he ran out of the store; (e) determining which two he saw running down the street; (f) attempting to cast doubt on the reliability of Fichera's memory if any answers had tended to implicate Rickenbacker.[14] Instead, trial counsel asked seven questions, all of which related to Fichera's own weapon, and to some tests which may have been performed on that gun by the police. It is difficult to perceive just what trial counsel was attempting to establish by this line of questioning. Fichera was licensed to possess the gun. He did not get the gun out until after the three robbers had left the store. There had been no suggestion that either of the two shots fired by Fichera had hit any of the robbers. In short, the line of questioning was simply not relevant to any possible defense theory.[15] One might

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14. In all fairness, in his summation trial counsel did mention in passing that neither eyewitness identified Rickenbacker as the third man (T 162).
15. Trial counsel suggested in summation that the fatal bullet came from Fichera's gun rather than from Morgan's (T 161-62). See below for a discussion of this theory.

well uphold the line of questions if they were part of an extensive, vigorous cross-examination. Standing alone they are irrelevant.

Trial counsel asked no questions of Michael Petrancosta, the son of the victim. Michael had been present in the store when the robbery and murder occurred. He had seen all three of the robbers. He had positively identified Ferguson and Morgan. Again, a first-year law student would have hammered home the point that this eyewitness was unable to identify the defendant as one of the men who had murdered his father, although he had no hesitation in identifying Morgan and Ferguson. As with Fichera, Michael could have been asked to describe the third man, and whether he was certain that only Morgan was armed.

In cross-examining Patrolman Walsh, who had pursued Ferguson and the third man when they ran from the getaway car, trial counsel determined that the two men had been running, that they were running fast, that they turned perhaps five corners during the chase, and that the chase lasted perhaps three or four minutes from beginning to end. Again, a first-year student would know enough to attack an identification based on a few glimpses from a car during an unsuccessful wild pursuit some fourteen months earlier. Walsh might also have been asked to describe the clothing worn by the third man (if Fichera and Michael Petrancosta had been asked the appropriate questions). A more serious

failure perhaps was the total lack of any questions pertaining to the identification of a weapon which was introduced into evidence. (Exhibit 1) Walsh had testified that the third man, Rickenbacker, had discarded a weapon early in the chase (T 59, 63). After the chase had culminated in the apprehension of Ferguson, Walsh put Ferguson in the car -- apparently without bothering to handcuff him (T 63) -- and returned to where he believed the weapon had been discarded. Walsh then got out of the car, leaving the unhandcuffed Ferguson alone in the car, and found a gun (T 63). There was no attempt to challenge the accuracy of Walsh's memory of where the weapon had been discarded. He was not asked so much as the colors, let alone the makes or models, of the two cars between which the third man had allegedly discarded a weapon. There were no questions as to whether he attempted to preserve possible latent fingerprints; there were no questions as to whether or not the retrieved weapon was checked for fingerprints.[16] In short, the cross-examination was incompetent.

In cross-examining Patrolman Scannapieco, trial counsel made no attempt to attack the basis of his identification of Rickenbacker as the third man. He did not ask him to describe the clothing worn by the third man. He was not asked whether he saw the third man discard his weapon,

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16. In summation, trial counsel did discuss the weak basis for Walsh's identification (T 163-65, 168) and that there had been no fingerprint evidence (T 161, 168).

or whether he kept that location under surveillance while Walsh was chasing the two fleeing men.

Detective Marshall, who had conducted the investigation of the case, was asked four questions on cross-examination: whether he first saw Rickenbacker at a police station, the date he first saw him, the location, and if he knew whether or not Rickenbacker had been arrested in Brooklyn. There were no questions directed towards establishing why Detective Marshall focused on Rickenbacker in his search for the third man. Such a line of questions would have clearly established a Bruton argument.[17]

Marshall was not asked why his "stake out" of Rickenbacker's supposed address was between midnight and six a.m. He was not asked whether he remained awake during the periods of surveillance.[18] In short, the cross-examination was incompetent.

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17. Bruton v. United States, 391 U.S. 123 (1968). In this case, the District Court rejected petitioner's Bruton argument on the grounds that there had been "no testimony that any co-defendant implicated petitioner or that they gave the address where the petitioner could be found to the police", Slip Opinion at 8 (emphasis added), even though it was more than obvious from the context of Marshall's testimony -- he testified he first interviewed Ferguson, Morgan and Austin, and then went looking for Rickenbacker, at what was believed to be his home address (T 75-77) -- that one or more of the co-defendants had implicated Rickenbacker.
18. Trial counsel did point out on summation that people are normally sleeping between midnight and six, and that Marshall might have fallen asleep during surveillance (T 166-67).

C. Trial Counsel Did Not Object to the Introduction of a Weapon.

Both Walsh and Scannapieco testified that when they first saw three men running down Albemarle, two of them -- Morgan and the third man -- were armed. (The eyewitness, as noted above, had stated that only Morgan was armed.) Walsh further testified that when the chase began, he observed the third man discard his weapon between two cars. Scannapieco apparently had not been in a position to observe this. After apprehending Ferguson, Walsh returned and found a weapon in the street. When the prosecution introduced the weapon thus received into evidence, trial counsel stated "no objection", (T 73), although there was not a scintilla of evidence that this was the same weapon allegedly discarded by the third man. There was no indication that Scannapieco was watching the location where the gun was thrown. Walsh, of course, was not watching that location while he was pursuing Ferguson and the third man. There was thus a period of at least five minutes when anyone might have come along and substituted, altered, changed, or tampered with anything that was there. There was apparently no attempt to either preserve or take any fingerprint evidence. There was no other evidence linking the weapon found with Rickenbacker. And yet counsel made no objection. An allegedly seasoned practitioner made inexcusable error.

D. Summation Was Ineffective.

The purpose of a defense summation is, obviously, to point out the weaknesses in the prosecution's argument, and to stress to the jury the strength's of the defense. At a minimum, even where the prosecution case is overwhelming, and no defense has been asserted, counsel must mention the presumption of innocence and the requirement that all essential elements be proved beyond a reasonable doubt. United States v. Hammonds, 425 F. 2d 597 (D. C. Cir. 1970) (reversing conviction on grounds of ineffective counsel because of the "casual summation", in spite of strong evidence of actual guilt); Matthews v. United States, 449 F. 2d 985 (D. C. Cir. 1971) (reversing conviction on grounds of ineffective counsel because of the "casual summation", in spite of strong evidence of actual guilt).

Here, trial counsel did not mention the words "presumption of innocence". Nor did he discuss the meaning of a not guilty plea. Although he mentioned "reasonable doubt" (T 159, 160, 161), he did not stress the requirement that the state prove each element of the offense beyond a reasonable doubt.

In discussing the eyewitness identifications by the two police officers he did not mention the possibilities of distortion through a windshield. Nor does he mention that, while Walsh was following the two fleeing men, he had been attempting to maneuver his car through

heavy traffic (T 60), or the difficulties which must have been inherent in such an endeavor. He also failed to bring out the discrepancy between eyewitness testimony (only Morgan was armed) and the police testimony (two men were armed).

In summation, trial counsel alluded to only one theoretically possible affirmative defense.[19] That theory, apparently asserted with a straight face by counsel, is so ludicrous as to defy comprehension. As best as can be pieced together from the summation, the "theory" goes something like this: Granted the victim died from a gunshot wound; but there was no ballistics evidence as to what gun the bullet had come from; there was no proof the bullet had come from Morgan's gun, or from the weapon found by Walsh after he apprehended Ferguson; Fichera (the store owner and cousin of the victim) testified that after the three robbers shot Petrancosta and ran out of the store, he (Fichera) had grabbed his own, licensed weapon, ran out of the store, and fired two shots in the general direction of the fleeing robbers. Perhaps, argued defense counsel, the fatal shot was fired by Fichera (T 161, 163). This argument was made

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19. Trial counsel had presented no defense, although Rickenbacker had a history of mental illness, there was no intimation of an insanity plea, and no request to determine his competency to stand trial. That his competency was questionable is underscored by the fact that he was transferred to the Matteawan facility for the criminally insane within months of his sentencing.

in the face of the clear testimony of the victim's son that Morgan had shot Petrancosta, and in face of the facts than (a) counsel had not asked the son one single question on cross-examination, let alone a line which might have indicated that Michael was lying to protect his uncle; (b) counsel had not asked Fichera any questions on cross-examination which might have led to the conclusion that he, Fichera, caused the death of his cousin; and (c) nothing in the direct testimony of either eyewitness could have led to an inference that the fatal bullet came from Fichera's weapon. In short, defense counsel asked the jury to believe an inherently incredible theory for which counsel had not bothered to lay the slightest foundation.

Finally, trial counsel cast discredit upon his client by derogatory remarks. Early in the summation he told the jury: "As far as I was concerned, as I indicated to you, I was assigned by the Supreme Court to defend this young defendant, and I'm doing that to the best of my ability". (T 157). These words clearly indicated to the jury that defense counsel didn't give two cents for his client, that Rickenbacker's case was one he wouldn't have touched with a ten-foot pole if he hadn't been assigned, and that he couldn't care less whether or not his client was convicted.

Trial counsel exhibited clear prejudice towards blacks. In discussing the testimony of Walsh and Scannapieco, he stated:

" They [Walsh and Scannapieco] see three black men, and these three black men are running, and you remember, I asked a question, 'Were they running fast?', and they said 'Very fast.' And the police officer who says he was there says they were running very fast.
Now, just open your minds, eyes. Three black men running very fast. Number one, how can you distinguish one from the other?"

The implication is obvious. All blacks look alike. There are no differences among them. One is just like the other. They're all the same. The inference to be drawn from such an attitude is likewise clear. Since the third robber was black, and since all blacks are alike, it doesn't matter what black man we convict. Trial counsel led his client like a sacrificial lamb to the slaughter.

E. Trial Counsel Failed to Protest a Blatant Misrepresentation by the Prosecutor.

Although normal courtroom etiquette frowns upon interruption of an adversary's opening or summation, there are certain instances where an objection is warranted if not mandated. Such a situation occurred here. The prosecutor in his summation told the jury that if they failed to reach a guilty verdict the people of the State of New York would have lost the case.

" You know, and you will be told in no uncertain terms that the verdict must be unanimous, and if one juror

> is fooled, the People have lost the case and I don't mean lose like Baltimore losing to Pittsburgh. We've lost on behalf of the People of the State of New York, to bring a defendant to justice whom the People feel merits justice in the form of a guilty verdict."
> (T 170)

This is a blatant misrepresentation of one of the basic tenets of our system. The prosecutor's role is not to seek convictions. He is "pledged to the accomplishment of one objective only, that of impartial justice". Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958). In accord, Berger v. United States, 295 U.S. 78 (1935), ABA Canons of Professional Ethics Canon 5, ABA Code of Professional Responsibility EC 7-13. The remarks of the prosecutor here suggest that it is the duty of all juries to convict because anyone brought to trial at all is guilty, and that society loses when any defendant is acquitted. This is a gross distortion of the principle that the sovereign never loses a criminal case. Trial counsel had a duty to object to the above-quoted remark. He failed in that duty.

F. Trial Counsel Failed to Correct the Court's Incorrect Factual Statements in the Charge, Even When Offered the Opportunity.

At five different points in the charge to the jury the court referred to "testimony" that two of the three robbers had guns in the store (T 195, 200, 208, 215, 218). This is simply incorrect. Both

eyewitnesses testified that only one of the robbers, positively identified by both as Morgan, had a weapon during the robbery. The two police officers, who were not present during the robbery, testified that two of the three running men were armed. This was a major discrepancy between the testimony of the eyewitnesses and that of the police officers. It should have been emphasized by defense counsel. Instead, the court's reiterated misstatements -- even though made in good faith -- tended to obliterate the discrepancy. After the charge, the court asked counsel for both sides, out of the presence of the jury, if there were any exceptions or any requests (T 232). Defense counsel could easily and respectfully have suggested to the court that he had several times spoken of two armed men in the store, that both Fichera and Petrancosta had testified that only Morgan was armed, and that this point should be brought to the attention of the jury. Even if the court had denied the request, the issue would have been preserved for appeal. His failure to do so constitutes incompetence.

G. The "Status" of Trial Counsel.

In rejecting appellant's contention that his trial counsel was ineffective, the District Court noted that trial counsel had appeared before that court in the past, and that the court was familiar with his skills. The District Court further noted that the attorney was a past president of the Brooklyn Bar Association. Slip Opinion at 13. As to

the proposition that trial counsel had evidenced skill on other occasions, the Vermont Supreme Court pointed out in Cronin, supra, that defendant finds little consolation in his attorney's skilled performance in other cases. A defendant is affected only by the level of competence displayed in his case. With all due respect, those qualities which may make for a very effective president of a bar association are not necessarily those which make for effective defense counsel. As Chief Justice (then Judge) Burger has noted, "the art of trying a case, whether for the lawyer or the judge, is a great art, and not everyone can do it." Burger, Counsel for the Prosecution and Defense -- Their Roles Under the Minimum Standards, 8 Am. Cr.L.Q. 2, 8 (1969).

Looking at the other side of the coin, it might well be asserted that a president of a bar association is expected to render a higher quality of assistance than the ordinary practitioner, that his performance should set the standards against which the rest of us can measure ourselves. If all attorneys should perform in a manner consistent with trial counsel's performance here, the Sixth Amendment guarantee of effective assistance of counsel will soon be laid to rest.

CONCLUSION

THE ORDER DENYING THE WRIT AND DISMISSING THE PETITION SHOULD BE REVERSED.

Respectfully submitted,

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STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of May 197 6 deponent served the within Brief upon:

Hon. Louis J. Lefkowitz
Attorney General

attorney(s) for

Respondents

in this action, at

2 World Trade Center
New York, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 26
day of May, 197 6

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977